

B4

U.S. Department of Justice

Immigration and Naturalization Service

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

FEB 28 2003

File: WAC 99 132 52848 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

**PUBLIC COPY**

**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

*[Signature]*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, on January 7, 2000. The petitioner subsequently filed a motion to reopen which was reviewed by the director. Upon reviewing the petitioner's motion, the director, on February 9, 2000, reaffirmed the prior denial of the petition. The appeal, filed in regards to the dismissal of the motion, was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on motion to reconsider. The motion will be granted. The Associate Commissioner's prior decision will be affirmed.

The petitioner was incorporated in 1997 in the State of California and is claimed to be a subsidiary of Om, Inc., located in Japan. The petitioner is engaged in the gasoline and foodmart business, as well as import and export. It seeks to employ the beneficiary as the vice president for business development. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been and will be employed in a managerial or executive capacity.

On the petitioner's latest motion, counsel asserts that the Associate Commissioner failed to consider the arguments made on appeal from dismissal of the first motion.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;

- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In response to the director's request for additional evidence, the petitioner submitted the following descriptions of the beneficiary's duties abroad and in the United States:

Duties abroad:

. . . . As Vice President, [REDACTED] was responsible for the management of the corporation on a day-to-day basis, the marketing of the business and the management of the finances. These duties included: the decision making role of whether to pursue new business opportunities, the nature and extent of financial obligations, developing corporate policy, short and long term, and making decisions on marketing techniques and expansion policies. . . .

A review of the organizational chart . . . reflects that Mr. Singh was the Director of Operations for 1995, 1996, and 1997. His duties included overseeing the daily operation of the individual restaurants (7), managing quality control, recruiting staff members, planning, and controlling the daily operations of the various restaurants throughout Japan. In each restaurant, the following individuals reported to [REDACTED] manager, assistant manager, cooks, floor staff and part-time employees. . . .

Duties in the United States:

. . . . Each of the gas stations maintains a market on the premises. Each employee is under the direct supervision of [REDACTED]. As President and Director of Operation of OM Singh, Inc., [REDACTED] is in charge of daily operations of each of the gas stations. This includes recruiting, training, scheduling employees' hours, purchasing agent, public relations and controlling the finances. The employees [sic] positions include cashiers and car mechanics. . . .

The director denied the petition and dismissed the petitioner's subsequent motion to reopen.

On appeal from the dismissal of the motion, counsel reiterates the above list of duties and adds that "[a]t present [REDACTED] develops, directs, and is solely responsible for the operation of three different gas stations/minimarkets . . . ." He also asserts

that the director overlooked the fact that it is the beneficiary's "sole responsibility . . . to purchase, develop and direct the United States based operations." However, after thoroughly reviewing the director's decision, it is clear that counsel's argument is without merit. The director merely focused on the fact that a great portion of the beneficiary's job in the United States requires him to supervise a staff of non-professionals, which indicates that the beneficiary operates, essentially, as a first-line supervisor. The beneficiary clearly has discretionary decision-making authority over the direction of the petitioning organization and over the business's personnel. Thus, the fact that the beneficiary performs some qualifying duties is undisputed. Consequently, the director's denial focuses on the fact that a majority of the beneficiary's job involves supervising non-professional personnel and that as such the petitioner failed to provide sufficient evidence that the beneficiary's duties are primarily managerial or executive. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

While counsel referred to a prior decision issued by the Associate Commissioner, in support of his arguments 8 C.F.R. 103.3(c) provides only that Service precedent decisions are binding on all Service employees. The same is not true of unpublished decisions. Therefore, counsel has provided no precedent case or statutory law to in support of his claims. As established by precedent case law, simply going on record without supporting documentary evidence is not sufficient. Id.

Counsel repeatedly emphasizes the beneficiary's key role in negotiating and purchasing a business enterprise which has since been merged with the petitioner's existing business. However, the Service cannot ignore the beneficiary's other non-qualifying duties, which comprise a significant portion of his time, and focus only on those duties that may be qualifying. The Service must take into consideration all of the beneficiary's duties. In the instant case, many of those duties are neither managerial nor executive. Furthermore, the beneficiary's authority in negotiating and investing in additional business ventures is merely an example of the high degree of discretion with which the beneficiary has been entrusted. Discretionary authority is only one of four prongs that are part of the definition of manager and executive. In counsel's effort to illustrate the beneficiary's discretionary authority, there is no discussion of any of the other three prongs that define a manager or executive.

On motion, counsel's only objection is that the Associate Commissioner's prior decision, dismissing the petitioner's appeal, did not properly address the points made by counsel in the appellate brief. Counsel did not specify any other objections in

support of the motion to reconsider. The Service has now fully addressed counsel's arguments and finds that the petitioner failed to overcome the objections described by the director in either of her decisions, one denying the petition or the other dismissing the petitioner's motion.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here that burden has not been met.

**ORDER:** The Associate Commissioner's decision, dated November 7, 2000, is affirmed.